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In the Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 78, 79

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

COLEMAN-GILBERT ASSOCIATES

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion of the United States Board of Tax Appeals (R. 11–15) is unreported. The opinion of the Circuit Court of Appeals (R. 28–35) is reported in 76 F. (2d) 191.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered in each case February 27, 1935. (R. 35.) A petition for writs of certiorari was filed

May 27, 1935, and was granted October 14, 1935. (R. 35.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trust involved is an association within the meaning of Section 2 (a) (2) of the Revenue Act of 1926 and Section 701 (a) (2) of the Revenue Act of 1928.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved are set out in the Appendix, *infra*, pp. 27–40.

STATEMENT

The facts in this case are not in dispute. The following facts are taken from the memorandum opinion of the Board and from the trust instrument.

In 1926, Harry Coleman, Pauline Coleman, Bernard Gilbert, Harris Levine and Lena Levine were co-owners of certain real estate consisting of about twenty apartment houses in Boston, Massachusetts. The property had originally been owned by Harry Coleman, Harris Levine and Bernard Gilbert in equal shares, but the first two had given their wives one-half of their interests. The three men had been associated together for many years in the operation and management of apartment houses. (R. 11, 13.)

On November 8, 1926, these five individuals executed a declaration of trust with respect to this property, naming themselves as trustees and designating the trust as the "Coleman-Gilbert Associates." (R. 6.)

The trustees were directed to hold this real estate and any other real estate acquired in trust to improve and dispose of it for the benefit of the settlors and their representatives and assigns, devisees or legatees. They were given express authority to acquire and sell other real property situated in Massachusetts, and to invest the trust property, including income, in such property or in notes or other obligations secured by real estate as they might select. They were also given the power to enter into any leases or agreements concerning the trust property and to borrow money and give mortgages. (R. 6–7.)

Whenever the trustees in their judgment had more funds than were required for development and improvement of the trust property and expenses (whether such funds were derived from sales or net income), they were directed to distribute the excess among the five settlors in proportion to the interests they had held in the property. (R. 7–8.)

It was provided that the *cestui que trustent* should have no interest in the trust property itself and no right to partition but that their interests should be personal property, which should pass as

such upon their deaths to their representatives, legatees or assigns without terminating the trust. (R. 6.)

The trust was to last for fifteen years, except that the trustees might terminate it before that time by a sale of the trust estate and division of the proceeds among the *cestui que trustent*. The trustees could amend the trust except that they could not extend its duration. They could also appoint a successor trustee, and if they failed to do so, the beneficiaries might do so. (R. 6, 7–8.)

The beneficiaries were not to be obligated by the trustees and the trustees were not to be personally liable for trust obligations except for breach of trust or wilful default. Persons dealing with the trust were to look only to the funds and property of the trust for payment. (R. 8.)

The gross cost of the apartments owned by the trust was $3,000,000, the gross rents about $420,000 a year, the operating expenses $300,000 a year including an employee's pay roll of $25,000 a year. Two of the trustees, Mr. Coleman and Mr. Gilbert, devoted their entire time to the management and Mr. Levine devoted a portion of his time thereto. They were assisted by an office force of three persons, but had no building managers or superintendents, and supervised the maintenance of the properties and repairs, collected rents and secured tenants, purchased supplies, effected the necessary financing and paid expenses. (R. 12.)

The trustees did not acquire any additional property except 300 shares of Shawmut Associates, purchased at the suggestion of the Shawmut Bank, which held a mortgage on one of the trust properties. (R. 14.)

The trust filed returns on Form 1041 (a fiduciary return) for the years 1927, 1928 and 1929. (R. 12.) The Commissioner held that the trust was an association and determined deficiencies of $10,975.78, $9,327.66 and $2,241.39, respectively. (R. 11.) The Board sustained the Commissioner's determination but on appeal to the Circuit Court of Appeals, the decision of the Board was reversed.

SUMMARY OF ARGUMENT

I

The trust here involved owned and operated twenty apartment houses in Boston and the trustees had authority to make additional investments in real estate and securities. Two of the five trustees devoted their entire time and a third devoted part of his time to developing, improving and managing the properties. The properties held in trust cost $3,000,000, contained 1,500 tenants, produced gross rentals of $420,000 a year and required an annual pay roll of $25,000 (exclusive of trustees' compensation). These facts support the Board's determination that the trust was doing business and its determination on that issue should have been deemed conclusive in the court below. But

even if the question whether it was doing business should be regarded as a mixed question of fact and law, the Board's conclusion was supported by many decisions of this and other courts in cases involving similar facts.

On no theory can it be regarded as a trust for conservation or liquidation. The fact that the five individuals who created it might not have done so if they had not wanted to avoid a partition of the property does not prove otherwise. That was the occasion for the agreement, but the purpose was to make a profit.

II

The satisfaction of the doing-business test should have been considered sufficient to classify the trust as an association, without regard to whether or not it employed certificates of stock, seals and other devices of a corporation. This is the view of several of the Circuit Courts of Appeals and it is supported by the reasoning of this Court and the actual facts in the leading case on the subject.

The regulations of the Treasury Department, at least since 1919, have not required that a trust have external resemblances to a corporation in order to be classified as an association but have emphasized the doing-business test. Prior to that time at one period the regulations provided that there should be certificates of beneficial interest, but the requirement was done away with in later regulations. While these regulations are not in

all respects complete, they emphasize the doing-business test.

That the trusts which are to be taxed as individuals under Section 219 of the Revenue Act of 1926 and Sections 161 and 162 of the Revenue Act of 1928 are trusts for conservation and not others, is indicated by the fact that trusts for infants and unborn children are specifically mentioned. Moreover, in assimilating associations to corporations rather than individuals, Congress must have had in mind the substantial resemblances between corporations and associations and not mere matters of form.

The elements which distinguish a business conducted by a corporation from one conducted by an individual are the continuity of the business without interruption by death or the transfer of interests, a centralized management and an absence of personal liability. All of these elements were present in this case. The interests of the beneficiaries could be alienated, even though they were not represented by certificates of interest, and the trust was to continue regardless of changes in the beneficial interests. Neither the beneficiaries nor the trustees were personally liable for any obligations of the trust. The management of the enterprise was in the trustees, who were to act for whatever persons held the beneficial interests. The trust should have been classified as an association for this reason.

We think that it is settled that beneficiary control is no longer important, but if the Court should hold otherwise, we wish to point out that the five beneficiaries were the five trustees and hence exercised control. The fact that the five individuals did not exercise control in their capacity as beneficiaries but in their capacity as trustees is not important. From a practical point of view, they exercised control and that is all that should be required to treat the trust as an association.

ARGUMENT

THE COLEMAN-GILBERT ASSOCIATES IS AN ASSOCIATION WITHIN THE MEANING OF SECTION (2) (A) (2) OF THE REVENUE ACT OF 1926 AND SECTION 701 (A) (2) OF THE REVENUE ACT OF 1928

The sole question presented is whether the Coleman-Gilbert Associates is an association within the meaning of Section 2 (a) (2) of the Revenue Act of 1926, *infra,* and Section 701 (a) (2) of the Revenue Act of 1928, *infra,* and hence is to be taxed as a corporation, or is a pure trust which, by virtue of Sections 219 and 161 and 162 of those Acts, is to be taxed as an individual.

The same question is involved in the cases of *T. A. Morrissey and James M. O'Brien, Trustees, etc.* v. *Helvering,* No. 17, October Term, 1935, which has been argued, *Joseph E. Swanson, etc.* v. *Helvering,* No. 108, October Term, 1935, and *Helvering* v. *E. E. Combs and Edward Everett, etc.,* No. 238, October Term, 1935.

The declaration of trust involved in this case was executed by five co-owners of twenty apartment houses in the city of Boston. The declaration provided that the five as trustees should hold the apartment houses and any other similar property which might be acquired, should operate the property, lease or sell it, invest the proceeds of sales, and should distribute to the five individuals or their representatives or assigns any income and any proceeds of sales not required for the development or improvement of the properties. The beneficiaries as such had no control over the trust, but by virtue of the fact that the five original beneficiaries (who were still the beneficiaries during the taxable years here involved) were also trustees, they had control.

The Board of Tax Appeals found that there were no shares of beneficial interest, that the trustees held no meetings and kept no minutes of meetings (R. 18), and we concede that so far as the record shows the trust employed no other corporate devices in transacting its business. It is our position that the court below erred in assuming that these matters were important and in failing to hold that the trust was an association because it was doing business.

I

That the trust was doing business is clear. The Board so found, and its finding is supported by the undisputed facts. Two of the five trustees devoted

their entire time and a third devoted part of his time to developing, improving, and managing the properties. Moreover, the properties held in trust cost $3,000,000, contained 1,500 tenants, produced gross rentals of over $400,000 a year, and required a pay roll (exclusive of trustees' compensation) of $25,000 a year.

We submit that the Board's finding on the question of whether the trust was doing business should have been regarded as a determination of fact which was conclusive upon the court below because supported by substantial evidence. *Ittleson* v. *Anderson,* 67 F. (2d) 323 (C. C. A. 2d). However, even if that determination be regarded as a mixed question of fact and law, there can be no doubt that it was doing business under the decisions of this and other courts. *Hecht* v. *Malley,* 265 U. S. 144; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Tyson* v. *Commissioner,* 68 F. (2d) 584 (C. C. A. 7th), certiorari denied, 292 U. S. 657; *Willis* v. *Commissioner,* 58 F. (2d) 121 (C. C. A. 9th); *Trust No. 5833, Security-First Nat. Bank* v. *Welch,* 54 F. (2d) 323 (C. C. A. 9th), certiorari denied, 286 U. S. 544; *Sloan* v. *Commissioner,* 63 F. (2d) 666 (C. C. A. 9th). Cf. *Gardiner* v. *United States,* 49 F. (2d) 992 (C. C. A. 1st).

Two of the cases reported *sub nom. Flint* v. *Stone Tracy Co., supra,* were those of the Park Realty Company and the Broadway Realty Company. The chief question presented in those cases was whether the companies were doing business within

the meaning of the Excise Act of 1909 which imposed an excise tax measured by net income on corporations doing business. On that issue this Court said (pp. 170–171):

> Of the realty companies, the Park Realty Company was organized to "work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings . . . and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal," etc.
>
> * * * * *
>
> The Broadway Realty Company was formed for the purpose of owning, holding and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed.
>
> * * * * *
>
> We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of

> this statute, and in the capacity necessary to make such organizations subject to the law.

The Hecht and the Haymarket trusts involved in *Hecht* v. *Malley, supra,* were likewise engaged in operating and managing rental real estate for profit and the Court there held that they were doing business.

The situation is quite different from one in which the only property owned by the trust is subject to a single lease and the trustees have only to collect the rent. See *McCoach* v. *Minehill Railway Co.,* 228 U. S. 295; *United States* v. *Emery,* 237 U. S. 28; *Lansdowne Realty Trust* v. *Commissioner,* 50 F. (2d) 56 (C. C. A. 1st). That the decisions in the *Minehill Railway* case and the *Emery* case are not to be extended to other situations is shown clearly by the decisions in *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, and *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503. See also *Harmar Coal Co.* v. *Heiner,* 34 F. (2d) 725, certiorari denied, 280 U. S. 610.

In the *Chile Copper Company* case, the Court said (p. 455):

> It was organized for profit and was doing what it principally was organized to do in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes. The exemption "when not engaged in business"

ordinarily would seem pretty nearly equivalent to when not pursuing the ends for which the corporation was organized, in the cases where the end is profit.

In this case the trust was organized to carry on an enterprise for profit and it was doing what it was organized to do.

The court below apparently thought that the Coleman-Gilbert Associates was not organized to conduct a business for profit because it considered that the purpose of the creators of the trust was to prevent a partition and division of the property in case one of the owners died within a definite period of time. In so holding, we think the court failed to distinguish between the occasion for the undertaking and its purpose. It may be true that the five individuals would not have entered into the trust agreement if they had not desired to prevent a partition. But in entering into the agreement, they did so with a view to making the profit they might make through the development and renting of apartment houses. If the same five individuals had discovered a desirable business site for rent and had decided to operate a grocery store under the same form of agreement, no one would argue that their purpose was to occupy a vacant building and not to operate a business for profit. So in this case the desire to prevent a partition of the property was merely a circumstance which influenced their decision to enter into an agreement

for the use of their property in a profit-making undertaking.

Nor is there any theory under which the Coleman-Gilbert Associates can be regarded as a liquidating trust. The trustees were not engaged in trying to sell the property as fast as possible so that the beneficiaries could collect their interests in cash, but were engaged in improving and renting a large number of apartment houses. The case, therefore, is clearly distinguishable from those in which corporations or associations originally organized for liquidation or subsequently devoted to liquidation after amendments to their charter or trust agreement have been held not to be engaged in business. See *Zonne* v. *Minneapolis Syndicate,* 220 U. S. 187; *White* v. *Hornblower,* 27 F. (2d) 777 (C. C. A. 1st); *Commissioner* v. *Atherton,* 50 F. (2d) 740 (C. C. A. 9th); *Commissioner* v. *Morriss R. Co. Trust No. 2,* 68 F. (2d) 648 (C. C. A. 7th).

II

We submit, therefore, that the only substantial question in this case is whether a trust which is doing business but admittedly employs no corporate forms is an association. This issue is presented in a somewhat different form than it was in the *Morrisey* case, *supra,* both because the trust involved here admittedly employed no corporate forms and because it could not under any theory be regarded as a liquidating trust, which the trustees

in the *Morrissey* case argued was the situation there.

As pointed out in our brief in the *Morrissey* case, which we incorporate herein by reference, the decisions of the Circuit Courts of Appeals are in conflict as to whether the doing-business test is sufficient in itself or whether the trust must employ certificates of stock, seals, and other devices of a corporation. (See Appendix B of that brief and also pages 19–25.) We submit that the better view is that the doing-business test is conclusive, as was held in *Ittleson* v. *Anderson,* 67 F. (2d) 323 (C. C. A. (2d); *Twin Bell Oil Syndicate* v. *Helvering,* 70 F. (2d) 402 (C. C. A. 9th), reversed on other grounds, 293 U. S. 312; and *Little Four Oil & Gas Co.* v. *Lewellyn,* 35 F. (2d) 149 (C. C. A. 3d), certiorari denied, 280 U. S. 613.

While this Court in *Hecht* v. *Malley, supra,* did not in specific language state that the doing-business test was conclusive, it apparently relied upon that test in holding that the three trusts there involved were associations within the meaning of Section 1 of the Revenue Act of 1918, which is identical with the statutes here involved. The Court there said (p. 161):

> We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a

> corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the Act of 1918; this being true independently of the large measure of control exercised by the beneficiaries in the *Hecht* and *Haymarket* cases, which much exceeds that exercised by the beneficiaries under the Wachusett Trust.

It is true that in the process of arriving at that result the Court cited a dictionary definition of the word "association" as "a body of persons united without charter, but upon the methods and forms used by incorporate bodies for the prosecution of some common enterprise", but the Court did not rest its decision upon finding that the trusts there involved employed corporate forms. In fact, the opinion does not show that the trusts used seals or had formal meetings of trustees similar to meetings of board of directors' meetings, or kept minutes of such meetings, or that they adopted any corporate forms other than certificates of beneficial interest.

None of the regulations of the Treasury Department issued subsequent to the decision of this Court in *Crocker* v. *Malley*, 249 U. S. 223, on March 17, 1919, have laid any emphasis on resemblances to corporate forms.

It will be noted that under Article 57 of Regulations 33, promulgated under the income-tax provisions of the Revenue Act of 1916, as amended by the Revenue Act of 1917, there was a requirement that there be certificates of beneficial interest.

This was omitted from regulations promulgated under the income-tax provisions of the Revenue Act of 1918 (Regulations 45, *infra*), and from all subsequent regulations. It also appeared in the capital stock regulations. See T. D. 2383. Articles 12 and 14 of Regulations 50, approved April 29, 1919 (T. D. 2835, *infra*) changed this. See also Articles 2 and 3 of Regulations 50, revised May 25, 1920 (T. D. 3039, *infra*),[1] and T. D. 3361 and T. D. 3622, *infra*.

The regulations promulgated subsequent to the decision of this Court in *Hecht* v. *Malley, supra,* have distinguished between trusts in which the

[1] All of the revenue acts, beginning with the Revenue Act of 1918 through the Revenue Acts of 1926 and 1928, here involved, have provided that the term "corporation" wherever used in the Act includes "associations, joint-stock companies, and insurance companies" and have thus made the same definition apply to capital stock taxes and income taxes. Section 38 of the Excise Act of 1909, which imposed an excise tax measured by income on every "corporation, joint-stock company or association" was different in that it required organization under a statute (see *Eliot* v. *Freeman*, 220 U. S. 178), but even in regulations issued under that Act no particular insistence was made on observance of minor corporate forms. See T. D. 1571, *infra*. The Revenue Act of 1913, which was before the Court in *Crocker* v. *Malley*, *supra*, did not impose a capital stock tax but imposed a tax on the income of every "corporation, joint-stock company or association" (see Sec. II G (a)), as did Section 10 of the Revenue Act of 1916. Section 407 of the latter Act also imposed a capital stock tax on every "corporation, joint-stock company or association" organized under a statute. Under Section 200 of the Revenue Act of 1917 an excess profits tax was imposed on "joint-stock companies or associations."

trustees are merely holding property for the collection of income and its distribution and are not engaged in carrying on a business, either by themselves or with the beneficiaries, and trusts in which the trustees are associated together with similar or greater powers than the directors of a corporation for the purpose of carrying on some business enterprise. That is true of the regulations involved in this case. See Articles 1502 and 1504 of Regulations 69, promulgated under the Revenue Act of 1926, *infra*, and Articles 1312 and 1314 of Regulations 74. See also T. D. 3598, III–1 Cumulative Bulletin 489; I. T. 2061, III–2 Cumulative Bulletin 5; Articles 1502 and 1504 of Regulations 65, promulgated under the Revenue Act of 1924, as amended by T. D. 3748, IV–2 Cumulative Bulletin 7, and T. D. 3749, IV–2 Cumulative Bulletin 6.

For reasons stated in the *Morrissey* brief, we think that the regulations are not broad enough in that they apparently do not cover a case where there is a single trustee engaged in managing a business trust, a defect which was remedied in Articles 801–2 and 801–3 of Regulations 86, promulgated under the Revenue Act of 1934, but they nevertheless emphasize the doing-business test and make no reference to external resemblances to a corporation.[1]

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[1] Section 704 (b) of the Revenue Act of 1928, a retroactive provision, recognizes that a certain type of trust with a single trustee was, under then existing regulations, treated as a strict trust in earlier years.

Hence the courts which, as the court below, have relied upon a balancing of elements similar to a corporation and those dissimilar in a given case (see, for example, *Commissioner* v. *Brouillard*, 70 F. (2d) 154 (C. C. A. 10th), certiorari denied *sub. nom. Helvering* v. *Pryor & Lockhart Development Co.*, 293 U. S. 574) can derive no real support from the decision of this Court in *Hecht* v. *Malley, supra,* or from Treasury Regulations.

Nor do we think that that construction is warranted under the statute. Under Section 219 of the Revenue Act of 1926, *infra,* and the corresponding sections of the Revenue Act of 1928 under which trusts are taxed as individuals, the statute refers to trusts for the benefit of infants, unborn children, and other classes found in the traditional type of trusts for conservation. Moreover, in assimilating associations to corporations and not to individuals in the statute, Congress must be considered to have found its justification in the substantial resemblances between corporations and associations and not in mere matters of form, just as in other tax situations. See *United States* v. *Phellis*, 257 U. S. 156; *Weiss* v. *Stearn*, 265 U. S. 242; *Corliss* v. *Bowers*, 281 U. S. 376; *Burnet* v. *Wells*, 289 U. S. 670; *Burnet* v. *Guggenheim*, 288 U. S. 280.

In *Hemphill* v. *Orloff*, 277 U. S. 537, this Court said, p. 550:

> Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers

> of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment. This was distinctly pointed out in *Oliver* v. *The Liverpool & London Life & Fire Ins. Co.*, 100 Mass. 531, affirmed here *sub nom. Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 566. See also *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 162; *Hecht* v. *Malley*, 265 U. S. 144; *Burk-Waggoner Oil Assn.* v. *Hopkins*, 269 U. S. 110; *Hamilton* v. *Young*, 116 Kan. 128; *Weber Engine Co.* v. *Alter*, 120 Kan. 557; *State* v. *Hinkle*, 126 Wash. 581; *State* v. *Paine*, 137 Wash. 566.

See also *Senior* v. *Braden*, decided by this Court May 20, 1935.

Flint v. *Stone Tracy Co., supra*, involved the excise tax on the privilege of doing business imposed by the Excise Act of 1909 on every "corporation" and "joint stock company or association organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws * * *". The argument was made that the tax was unconstitutional because a similar tax was not imposed on partnerships or individuals. In rejecting that argument, the Court said (pp. 161–162):

> The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by

> individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals.

Thus, the elements of the continuity of the business, *without interruption by death or dissolution*, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors and the general absence of individual liability were regarded as the elements which distinguished a business operated by a corporation from one operated by a partnership or individual and as the justification for the tax in *Flint* v. *Stone Tracy Co.* We

submit that if the doing-business test is not regarded as conclusive in determining what corporations should be regarded as associations, the existence of these elements in a trust which is doing business should be regarded as sufficient reason for assimilating it to an association and hence to a corporation rather than to an individual.

This was the view of the Circuit Court of Appeals for the Seventh Circuit in the case of *Reinecke* v. *Kaempfer*, 72 F. (2d) 469, certiorari denied, 294 U. S. 708, where the court said (pp. 470–471):

> As we pointed out in *Sears, Roebuck, etc.*, v. *Commissioner*, 45 F. (2d) 506, there are various kinds of corporations, some with and some without shares of stock; and some for and others not for pecuniary profit. And it was there held that shares of stock, or the equivalent, and assignable interests of beneficiaries were not essential to constitute a taxable association under the statute. The entity there involved was without shares of capital stock and without assignable interests, but it was held to be a taxable association under the act.
>
> We are satisfied that the similitude referred to is not in those essentials which distinctly stamp the entity as a corporation, but rather in the business carried on and the manner of its transaction. This entity carried on its business in substantially the same way that a corporation would have carried it on. It regularly bought and sold merchandise for the purpose of realizing

> profit thereon; it constituted the persons to carry on the business, and even made provision for exemption of the trustees from personal liability for trust obligations, much as in the case of business corporations.

In the present case the trust was doing business. The trust instrument expressly provided that the trustees should have no power to bind the beneficiaries, that those dealing with the trust should look to the assets of the trust for payment and that the trustees should not be liable except for breach of trust or wilful default. (R. 8.) The interests of the beneficiaries could be alienated, although they were not represented by certificates of interest, and the trust was to continue regardless of changes in the beneficial interests. The management of the enterprise was in the trustees, who were to act for whatever persons held the beneficial interests. There was consequently the absence of personal liability, the continuity and the centralized control that are characteristic of a corporation.

We submit that this was all that was required under the statute for the trust to be classified as an association.

It is our view that the question of control is no longer important, but if the Court should entertain other views, we point out that there was actual beneficiary control during the taxable years involved because the five trustees and the five beneficiaries were identical.

In *Crocker* v. *Malley, supra,* this Court held that a trust was not an association where there was not beneficiary control. In *Hecht* v. *Malley, supra,* the Court held that a trust could be an association regardless of beneficiary control, where it was doing business. The courts generally have accepted the view, correctly, we think, that the question of beneficiary control has ceased to be controlling (*Little Four Oil & Gas Co.* v. *Lewellyn, supra; Ittleson* v. *Anderson, supra; White* v. *Hornblower, supra; Twin Bell Oil Syndicate* v. *Helvering, supra*), but they have not held that a trust in which the beneficiaries do have control is not an association.

The regulations here involved, Articles 1502 and 1504 of Regulations 69 and Articles 1312 and 1314 of Regulations 74, *infra,* provide that a trust in which the beneficiaries have control is to be regarded as an association. The regulations issued under the Revenue Acts of 1932 and 1934 were changed in that respect. See Articles 1312 and 1314 of Regulations 77, and Articles 801–2 and 801–3 of Regulations 86.

We concede that the five beneficiaries do not exercise control in their capacity as beneficiaries. But they did exercise it during the taxable years here involved in their capacity as trustees, since the five persons who were the sole beneficiaries were likewise the sole trustees. This is sufficient under the decision in *Investment Trust of Mutual Investment Co.* v. *Commissioner,* 27 B. T. A. 1322, af-

firmed *per curiam*, 71 F. (2d) 1009 (C. C. A. 2d). In that case there were two classes of beneficiaries, neither of which had control as such, but the class holding the greater part of the beneficial interests acted as trustee. The entity was held to be an association. See also Sol. Op. 56, 3 Cumulative Bulletin 10, 12, to the same effect, and compare *Landsdowne Realty Trust* v. *Commissioner, supra.*

As a practical matter, the beneficiaries have control in such a case, if the Court should consider that control is required. Control is not a matter of title but of practical effect. See *Tyler* v. *United States*, 281 U. S. 497; *Corliss* v. *Bowers, supra.*

The court below did not consider this point, although it was discussed in the briefs and may be considered here, if the Court should still consider that control is important.

The court below erred in its belief that to hold this trust an association would result in the kind of double taxation that this Court sought to avoid in *Crocker* v. *Malley, supra.* Under the statute involved in *Crocker* v. *Malley, supra*, a corporation receiving dividends from another corporation was taxed upon them, even though the paying corporation had been taxed upon its earnings, and the Court was undoubtedly influenced by that fact in holding that the trust there involved was not to be taxed as an association. But under the Revenue Acts of 1926 and 1928, a corporation is not taxed on dividends received from another corporation. See Section 234 (a) (6) of the Revenue Act of 1926

and Section 23 (p) of the Revenue Act of 1928. Hence, if this trust is taxed as an association it will not pay any tax or corporate dividends which it receives and there is no double taxation such as was involved in *Crocker* v. *Malley, supra.*

Any distributions which the trust itself makes (if taxed as an association) will be subject to surtax, if a surtax is applicable (but not to normal tax), as in the case of any corporation. That is not regarded as double taxation. See *Hellmich* v. *Hellman,* 276 U. S. 233.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 2. (a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * *

[U. S. C., Title 26, Sec. 1696.]

SEC. 212. (a) In the case of an individual the term "net income" means the gross income as defined in section 213, less the deductions allowed by sections 214 and 206.

* * * * *

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under paragraph (3) in the same or any succeeding taxable year;

(3) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but

the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

* * * * *

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sections 161 and 162 (b) and (c) of the Revenue Act of 1928 contain substantially the same provisions as the provisions of Section 219 of the Revenue Act of 1926, *supra*.

SEC. 701. DEFINITIONS.

(a) When used in this Act—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

* * * * *

[U. S. C., Title 26, Sec. 1696.]

SEC. 704. TAXABILITY OF TRUSTS AS CORPORATIONS—RETROACTIVE.

(a) If a taxpayer filed a return as a trust for any taxable year prior to the taxable year 1925 such taxpayer shall be taxable as a trust for such year and not as a corporation, if such taxpayer was considered to be taxable as a trust and not as a corporation either (1) under the regulations in force at the time the return was made or at the time of the termination of its existence, or (2) under any ruling of the Commissioner or any duly authorized officer of the Bureau of Internal Revenue applicable to any of such years, and interpretative of any provision of the Revenue Act of 1918, 1921, or 1924, which had not been reversed or revoked prior to the time the return was made, or under any such ruling made after the return was filed which had not been reversed or revoked prior to the time of the termination of the taxpayer's existence.

(b) For the purpose of the Revenue Act of 1926 and prior Revenue Acts, a trust shall, at the option of the trustee exercised within one year after the enactment of this Act, be considered as a trust the income of which is taxable (whether distributed or not) to the beneficiaries, and not as an association, if such trust (1) had a single trustee, and (2) was created and operated for the sole purpose of liquidating real property as a single venture (with such powers of administration as are incidental thereto, including the acquisition, improvement, conservation, division, and sale of such property), distributing the proceeds therefrom in due course to or for the benefit of the beneficiaries, and discharging indebtedness secured by the trust property, and (3) has not made a return for the taxable year as an association.

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

Art. 1502. *Association.*—Associations and joint-stock companies include associations, common law trusts, and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form

is an association or corporation within the meaning of section 2.

ART. 1504. *Association distinguished from trust.*—Where trustees merely hold property for the collection of the income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries in the carrying on of any business, and the beneficiaries have no control over the trust, although their consent may be required for the filling of a vacancy among the trustees or for a modification of the terms of the trust, no association exists, and the trust and the beneficiaries thereof will be subject to tax as provided by section 219 and by articles 341–347. If, however, the beneficiaries have positive control over the trust, whether through the right periodically to elect trustees or otherwise, an association exists within the meaning of section 2. Even in the absence of any control by the beneficiaries, where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but are associated together with similar or greater powers than the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the statute.

Treasury Regulations 74, promulgated under the Revenue Act of 1928:

Articles 1312 and 1314 of Regulations 74 are substantially the same as Articles 1502 and 1504 of Regulations 69, *supra*.

T. D. 1571, Treasury Department, Internal Revenue Decisions, Vol. 12, p. 131 (approved December 3, 1909):

REGULATIONS RELATING TO THE ASSESSMENT AND COLLECTION OF THE SPECIAL EXCISE TAX IMPOSED BY SECTION 38, ACT OF AUGUST 5, 1909, ON CORPORATIONS, JOINT STOCK COMPANIES, ASSOCIATIONS, AND INSURANCE COMPANIES

* * * * *

ARTICLE I

The attention of collectors and others is specially called to the fact that the tax imposed by this section of the law applies to all corporations, joint stock companies, associations, or insurance companies described (except those specifically exempted), without reference to the kind of business carried on, and that the tax is to be computed upon the NET INCOME of such corporations, joint stock companies, associations, and insurance companies, which shall be calculated by subtracting from the gross income received from all sources during the year certain deductions specifically set forth in the statute.

Every corporation, joint stock company, association, or insurance company not specifically enumerated as exempt shall make the return required by law, whether it may have net income liable to tax or not.

In the case of corporations, joint stock companies, associations, or insurance companies organized under the authority of the United States or any State or Territory thereof, including Alaska and District of Columbia, such net income relates not only to the business carried on within the confines of the United States, but to income received from business transacted in any foreign country as well. In case of corporations,

joint stock companies, and associations organized under the authority of foreign countries the terms "Gross income," "Net income," and "Authorized deductions" relate only to business transacted within the United States or any State or Territory thereof.

Regulations 33, revised (as printed in T. D. 2690), promulgated October 3, 1917.

ART. 57. *Corporations defined.*—"Corporation" or "corporations", as used in these regulations, shall be construed to include all corporations, joint-stock companies and associations, and all insurance companies coming within the terms of the law, as well as all business trusts organized or created for the purpose of engaging in commercial or industrial enterprises, the capital of which is evidenced by certificates or shares of interest issued or issuable to members on the basis of which profits are distributed or distributable. Such organizations will be hereinafter referred to as corporations.

Regulations 45 (1919 Ed.), promulgated under the Revenue Act of 1918:

ART. 1502. *Association.*—Associations and joint-stock companies include associations, common law trusts and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization.

T. D. 2835, Treasury Decisions, Internal Revenue, Vol. 21, p. 481:

REGULATIONS 50 (APPROVED APRIL 29, 1919), RELATING TO THE CAPITAL STOCK TAX UNDER TITLE X OF THE REVENUE ACT OF 1918

ART. 12. *Domestic corporation; association.*—Associations and joint-stock companies include associations, common-law trusts and organizations by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the members or shareholders on the basis of the capital stock which each holds or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. But see article 13–15.

ART. 14. *Domestic corporation: association distinguished from trust.*—Where trustees hold real estate subject to a lease and collect the rents, doing no business other than distributing the income less taxes and similar expenses to the holders of their receipt certificates, who have no control except the right of filling a vacancy among the trustees and of consenting to a modification of the terms of the trust, no association exists. If, however, the cestuis que trust have a voice in the conduct of the business of the trust, whether through the right periodically to elect trustees or otherwise, the trust is an association within the meaning of the statute.

T. D. 3039, Treasury Decisions, Internal Revenue, Vol. 22, p. 321:

REGULATIONS 50, REVISED MAY 25, 1920, RELATING TO THE CAPITAL STOCK TAX

ART 2. *Corporations.*—The term "corporation" includes associations, joint-stock companies, whether created by statute or by contract, and insurance companies, but not partnerships, properly so called, and whether or not organized for profit or having a capital stock represented by shares.

ART. 3. *Associations and joint-stock companies.*—Associations and joint-stock companies include organizations, by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributable among the members or shareholders on the basis of the capital stock held by each, or, where there is no capital stock, on the basis of the proportionate share of capital which each has or has invested in the business or property of the organization. But see articles 4, 5, 6, 7. An organization, the membership interests in which are transferable without the consent of all of the members, however the transfer may be otherwise restricted, and the business of which is conducted by trustees or directors and officers without the active participation of all the members as such, is an association.

ART. 7. *Massachusetts trusts.*—The test of liability in all cases involving trusts of the Massachusetts type is whether the cestuis que trustent have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in

complete control of the business, the beneficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the cestuis que trustent have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust.

T. D. 3361, Treasury Decisions, Internal Revenue, Vol. 24, pp. 861–863:

REGULATIONS 64, 1922 EDITION, APPROVED JUNE 15, 1922, RELATING TO THE CAPITAL STOCK TAX UNDER THE REVENUE ACT OF 1921

ART. 3. *Corporations.*—The term "corporation" includes associations and joint-stock companies, whether created by statute or by contract, but not partnerships, properly so-called. It is immaterial whether the companies were organized for profit or have a capital stock represented by shares.

ART. 4. *Associations and joint-stock companies.*—Associations and joint-stock companies include organizations, by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net in-

come of which, if any, is distributable among the members or shareholders on the basis of the capital stock held by each, or, where there is no capital stock, on the basis of the proportionate share of capital which each has or has invested in the business or property of the organization. But see articles 5, 6, 7, 8. An organization, the membership interests in which are transferable without the consent of all of the members, however the transfer may be otherwise restricted, and the business of which is conducted by trustees or directors and officers without the active participation of all the members as such, is an association.

ART. 8. *Massachusetts trusts.*—The test of liability in all cases involving trusts of the Massachusetts type is whether the cestuis que trustent have by the terms of the trust agreement a voice in the management or control of the trust. Where the trustees are in complete control of the business, the beneficiaries having no control except the right of filling vacancies among the trustees or of consenting to a modification of the terms of the trust or of dissolving the trust, no association exists. If, however, the cestuis que trustent have a voice in the control or management of the business of the trust, whether through the right to elect trustees periodically or to remove the trustees or to restrict the trustees as to the management of the trust or otherwise, the trust is an association within the meaning of the statute. Where the trustees hold in their own right a sufficient number of the certificates of beneficial interest to constitute control as between the beneficiaries, the trust will be held to be an association regardless of the powers conferred upon the trustee by the instrument creating the trust.

T. D. 3622, Treasury Decisions, Internal Revenue, Vol. 26, pp. 546–548:

REGULATIONS 64, APPROVED JULY 29, 1924, 1924 EDITION, RELATING TO THE CAPITAL STOCK TAX.

ART. 3. *Corporations.*—The term "corporation" includes associations and joint-stock companies, whether created by statute or by contract, but not partnerships, properly so called. It is immaterial whether the companies were organized for profit or have a capital stock represented by shares.

ART. 4. *Associations and joint-stock companies.*—Associations and joint-stock companies include organizations, by whatever name known, which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributable among the members or shareholders on the basis of the capital stock held by each, or, where there is no capital stock, on the basis of the proportionate share of capital which each has or has invested in the business or property of the organization.

ART. 8. *Trusts.*—Two distinct classes of trusts are recognized, namely, holding trusts and operating trusts.

Holding trusts are those in which the trustees are merely holding property for the collection of the income and distributing it among the beneficiaries and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. Such trusts are not associations within the meaning of the law and are not subject to the tax.

Operating trusts are those in which the trustees are not restricted to the mere collection of funds and paying them over to the beneficiaries but are associated together in much the same manner as directors in a corporation for the purpose of, and are actually engaged in, carrying on some business enterprise. These trusts, whether of the Massachusetts type or otherwise, are to be deemed associations within the meaning of the act, independently of any control exercised by the beneficiaries, and subject to the tax.

Treasury Regulations 64 (Capital Stock Tax), under Section 215 of the National Industrial Recovery Act, c. 90, 48 Stat. 195:

ART. 3. *Corporations.*—The term "corporation" includes associations, joint-stock companies, and insurance companies, but not partnerships. (See Article 5.)

ART. 4. *Associations and joint-stock companies.*—Associations and joint-stock companies include associations, common-law trusts, and organizations by whatever name known which act or do business in an organized capacity, whether created under and pursuant to State laws, agreements, declarations of trust, or otherwise, the net income of which, if any, is distributed or distributable among the shareholders on the basis of the capital stock which each holds, or, where there is no capital stock, on the basis of the proportionate share or capital which each has or has invested in the business or property of the organization. A corporation which has ceased to exist in contemplation of law but continues its business in quasi-corporate form is an association or corporation.

ART. 6. *Association distinguished from trust.*—Where trustees merely hold property for the collection of income and its distribution among the beneficiaries of the trust, and are not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business, no association exists. Where the trustees are not restricted to the mere collection of funds and their payment to the beneficiaries, but have powers similar to or greater than those of the directors in a corporation for the purpose of carrying on some business enterprise, the trust is an association within the meaning of the Act.

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